

IN THE SUPREME COURT OF THE STATE OF ALASKA

RESOURCE DEVELOPMENT COUNCIL)
FOR ALASKA, INC.; ALASKA TRUCKING)
ASSOCIATION, INC.; ALASKA MINERS)
ASSOCIATION, INC.; ASSOCIATED)
GENERAL CONTRACTORS OF ALASKA;)
ALASKA CHAMBER; and ALASKA)
SUPPORT INDUSTRY ALLIANCE,)

Appellants and Cross-Appellees,)

v.)

KEVIN MEYER, in his official capacity,)
as Lt. Governor of the State of Alaska;)
GAIL FENUMIAI, in her capacity as Director)
of the Alaska Division of Elections; the)
STATE OF ALASKA, DIVISION OF)
ELECTIONS,)

Appellees,)

v.)

VOTE YES FOR ALASKA'S FAIR SHARE,)

Appellee and Cross-Appellant.)

Trial Court Case No. 3AN-20-05901CI

Supreme Court Nos. S-17834/S-17843

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
THE HONORABLE THOMAS A. MATTHEWS, PRESIDING

CROSS-APPELLEES' BRIEF

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Alaska Statute 15.45.110. Circulation of petition; prohibitions and penalty.

- (a) The petitions may be circulated throughout the state only in person.
- (b) [Repealed, § 92 ch 82 SLA 2000.]
- (c) A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.
- (d) A person or organization may not knowingly pay, offer to pay, or cause to be paid money or other valuable thing to a person to sign or refrain from signing a petition.
- (e) A person or organization that violates (c) or (d) of this section is guilty of a class B misdemeanor.
- (f) In this section,
 - (1) "organization" has the meaning given in AS 11.81.900;
 - (2) "other valuable thing" has the meaning given in AS 15.56.030(d);
 - (3) "person" has the meaning given in AS 11.81.900.

Alaska Statute 15.45.130. Certification of circulator.

Before being filed, each petition shall be certified by an affidavit by the person who personally circulated the petition. In determining the sufficiency of the petition, the lieutenant governor may not count subscriptions on petitions not properly certified at the time of filing or corrected before the subscriptions are counted. The affidavit must state in substance

- (1) that the person signing the affidavit meets the residency, age, and citizenship qualifications for circulating a petition under AS 15.45.105;
- (2) that the person is the only circulator of that petition;
- (3) that the signatures were made in the circulator's actual presence;
- (4) that, to the best of the circulator's knowledge, the signatures are the signatures of the persons whose names they purport to be;

(5) that, to the best of the circulator's knowledge, the signatures are of persons who were qualified voters on the date of signature;

(6) that the circulator has not entered into an agreement with a person or organization in violation of AS 15.45.110 (c);

(7) that the circulator has not violated AS 15.45.110 (d) with respect to that petition; and

(8) whether the circulator has received payment or agreed to receive payment for the collection of signatures on the petition, and, if so, the name of each person or organization that has paid or agreed to pay the circulator for collection of signatures on the petition.

I. STATEMENT OF THE CASE

A. Introduction

Cross-Appellant Vote Yes for Alaska’s Fair Share (“Fair Share”) asks this Court to improperly reverse engineer a law passed by the Alaska Legislature. To prevail in its cross appeal, Fair Share needs this Court to engage in statutory construction of AS 15.45.110(c) that turns the normal process on its head. Fair Share asks this Court to ignore its well-established rule that statutes are presumed to be constitutional and instead start with a presumption that AS 15.45.110(c)’s plain terms are unconstitutional. Once its plain terms are presumed to be unconstitutional, Fair Share asks this Court to ignore AS 15.45.110(c)’s meaning and to interpret it in a manner that Fair Share alleges is more constitutionally sound. This is exactly backwards.

The primary objective of statutory construction is to determine the intent of the legislature that passed the statute. That process begins by looking at the statute’s plain terms, and if necessary, the legislative history and the legislative purpose behind the statute.¹ As the superior court correctly concluded, AS 15.45.110(c)’s plain meaning prohibits circulators from receiving more compensation than \$1 per signature.² The statute does not distinguish between different forms of payment (hourly, salary, or per signature), but simply caps circulator payment at \$1 or less for each signature gathered. The legislative history confirms that the Legislature considered but rejected a version of the payment cap

¹ *Western Star Trucks, Inc. v. Big Iron Equipment Service, Inc.*, 101 P.3d 1047, 1050 (Alaska 2004).

² Exc. 235.

that allowed circulator payment exceeding \$1 per signature if the circulator was not being paid on a per-signature basis. The Legislature did not want the form of the payment to govern the payment cap, but instead adopted a uniform cap that applies no matter the form of compensation.

The plain language and legislative history supports the superior court's ruling that "AS 15.45.110(c) prohibits any form of payment if it ends up exceeding \$1 per signature gathered."³ Fair Share's contrary reading of the statute is a self-serving attempt to read the statute in a way that exculpates it, but has no basis in the plain language and is undercut by the legislative history.

Fair Share turns the doctrine of constitutional avoidance on its head. Fair Share asks this Court to disregard the presumption of constitutionality that applies to duly enacted statutes and to rule without any evidentiary record that AS 15.45.110(c) constitutes a prior restraint on speech, if it is applied to circulators compensated on an hourly or salary basis. In support, Fair Share cites three inapposite federal cases: the U.S. Supreme Court's decision in *Meyer v. Grant*,⁴ the Eighth Circuit's decision in *Initiative & Referendum Inst. v. Jaeger*,⁵ and the Ninth Circuit's decision in *Prete v. Bradbury*.⁶ None of these cases supports Fair Share's argument that AS 15.45.110(c) unconstitutionally infringes on its

³ Exc. 238.

⁴ Cross-Appellant Br. at 17 (citing *Meyer v. Grant*, 486 U.S. 414, 414-25 (1988)).

⁵ *Id.* at 17-18 (citing *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001)).

⁶ *Id.* at 17-18 (citing *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006)).

free speech right to circulate petitions in support of the 19OGTX initiative. Instead, these cases confirm that it would be error for this Court to ignore the law’s presumption of constitutionality and to rule AS 15.45.110(c) unconstitutional based on no evidentiary record showing the burden, if any, that the payment cap allegedly places on petition circulation in Alaska.

In *Meyer*, the U.S. Supreme Court struck down Colorado’s statute that prohibited any pay to circulators, after the challengers to the statute elicited evidence at trial showing the burden the outright payment ban had on petition circulation. In *Jaeger*, the Eighth Circuit upheld North Dakota’s statute that prohibited per-signature payment of circulators, reasoning that *Meyer* did not “discuss[] the extent to which a state can permissibly regulate the payment structure for petition circulators.”⁷ Further, the plaintiffs had “produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures. The [plaintiffs] have only offered bare assertions on this point.”⁸ The court therefore affirmed dismissal of the initiative group’s complaint seeking to invalidate North Dakota’s statute as unconstitutional.⁹ In *Prete*, the Ninth Circuit clarified that if a ballot group seeks to have a court hold a circulator payment statute unconstitutional under the First Amendment, that challenger must submit evidence of the burden it has on circulation of petitions before a court will weigh the statute’s

⁷ *Initiative & Referendum v. Jaeger*, 241 F.3d 614, 617 (8th Cir. 2001).

⁸ *Id.* at 618.

⁹ *Id.*

constitutionality.¹⁰ The *Prete* court discussed all of the evidence presented by the plaintiffs of the burden the statute placed on petition circulation, and upheld Oregon’s statute prohibiting per-signature payment of petition circulators.¹¹ None of the cases cited by Fair Share support its conclusion that the superior court correctly determined that AS 15.45.110(c) is unconstitutional. Appellants’ Opening Brief addresses this issue in full, and demonstrates the superior court’s reversible error in holding AS 15.45.110(c) facially unconstitutional without any evidentiary showing of the burden it places on petition circulation.¹²

Fair Share falsely claims that Resource Development Council and the other appellants are acting at the behest of three oil companies. In fact, these trade organizations—Resource Development Council for Alaska, Inc.; Alaska Trucking Association, Inc.; Alaska Miners Association, Inc.; Associated General Contractors of Alaska; Alaska Chamber; and Alaska Support Industry Alliance (collectively “Resource Development Council”)—are acting on behalf of most of the business owners and working men and women of Alaska.

These trade organizations believe that Alaska law should be enforced as written, and that this case presents a clear abuse of the initiative process. Fair Share abused the initiative process by ignoring Alaska’s cap on circulator payment. But for the

¹⁰ *Prete v. Bradbury*, 438 F.3d 949, 963-68 (9th Cir. 2006).

¹¹ *Id.* at 971.

¹² Appellants’ Opening Br. at 17-25.

advertisements Fair Share's professional circulator placed on online hiring websites,¹³ Resource Development Council would have been left unable to show that a ballot group was illegally gathering signatures. Resource Development Council is standing up for the Alaska ballot initiative process.

Fair Share is the imposter in this case. Alaska Public Offices Commission records reflect that Fair Share is simply the pet project of one wealthy individual, Robin Brena.¹⁴ The initiative process is supposed to be an exercise in direct democracy, not an avenue for wealthy people to buy ballot access for laws they fancy. Instead of organizing grass roots support for his initiative, Mr. Brena cut corners by paying \$237,500 to a Las Vegas company to collect signatures. That company violated a criminal statute by paying in excess of the statutory cap in AS 15.45.110(c), and then offered false certifications that claimed compliance with the payment cap. The Alaska Legislature plainly intended that this conduct should disqualify petition subscriptions. Appellants, who represent a wide swath of Alaska industries and working people, believe that this misconduct harms the integrity of the election process and leaves the initiative system vulnerable to manipulation by the wealthy and by special interests, precisely the consequences the Legislature sought to avoid with the passage of AS 15.13.110 and .130. Fair Share's name-calling and bluster are simply a distraction from its own misconduct.

¹³ See the advertisements themselves at [Exc. 226 at Exhibits L and M] (Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment (July 14, 2020); *see also* [Exc. 005] (Complaint describing the advertisements).

¹⁴ See *infra* nn. 69-70.

Resource Development Council respectfully asks this Court to hold that AS 15.45.110(c)'s plain language prohibits any form of payment to a circulator that exceeds \$1 for each signature collected and that the legislative history confirms that is what the Alaska Legislature intended. This Court should also reject Fair Share's incomplete and improper constitutional challenge to AS 15.45.110(c).

B. Factual and Procedural Background

On October 15, 2019, Lieutenant Governor Meyer certified that the 19OGTX initiative application was in proper form and had the sufficient number of sponsors to advance the initiative to the signature gathering stage.¹⁵ On October 23, 2019, the Division of Elections released the printed petition booklets to Fair Share to gather the necessary signatures to put 19OGTX on the ballot. [Exc. 004]¹⁶

In October-November 2019, Fair Share hired Texas Petition Strategies, LLC ("TPS") and Advanced Micro Targeting, Inc. ("AMT") to conduct most of Fair Share's signature-gathering effort in support of the 19OGTX initiative. [Exc. 224]¹⁷ TPS is a

¹⁵ See Letter from Kevin Meyer to Robin Brena (Oct. 15, 2019) (available online at lieutenant governor's official website: <http://www.elections.alaska.gov/petitions/19OGTX/19OGTX%20-%20Sponsor%20Application%20letter.pdf>).

¹⁶ See Alaska Division of Elections Initiative Petition List (available online at the Division of Elections official website: <http://www.elections.alaska.gov/Core/initiativepetitionlist.php#19OGTX>).

¹⁷ Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 3-4 (July 6, 2020) (filed under seal). At the outset of the litigation, the parties entered into a standard protective order governing documents exchanged in discovery. [R. 156-166] When AMT and Fair Share produced discovery, they marked every document as "Confidential," which under the terms of the protective order required the documents themselves and any court filing discussing the specific contents of those documents to be filed under seal. [R. 156-165] Resource Development Council moved to have these documents unsealed in the

Texas company based out of the Dallas area, and AMT is a Nevada corporation based out of Las Vegas. [Exc. 224]¹⁸ The filings below explain the contractual relationship between TPS and AMT, but it suffices for purposes of this background that TPS did not gather signatures, and AMT did. [Exc. 224]

AMT paid 24 circulators to gather signatures in support of 19OGTX. [Exc. 224]¹⁹ These 24 circulators submitted 30,232 subscriptions in support of the initiative, which amounted to 67% of the 44,881 total subscriptions Fair Share submitted in support of 19OGTX. [Exc. 224]²⁰ Ultimately, the lieutenant governor invalidated 4,367 of the 30,232 AMT-gathered signatures, leaving 25,865 total qualifying signatures gathered by AMT in support of the initiative. [Exc. 224]²¹ It is these 25,865 signatures that are at issue in this appeal.

Below, Resource Development Council obtained payment records from AMT²² and, using the Division of Elections' petition records, calculated how much compensation

superior court because the public is entitled to see how much Fair Share paid professional petition circulation companies to collect the signatures, and how much AMT paid each of its circulators to travel to Alaska to collect the signatures. [R. 48-57] While that motion to unseal was ripe in the superior court, the court did not rule on it prior to this appeal. [R. 32-38] Resource Development Council cites and discusses only the non-confidential portions of Plaintiffs' Memorandum in Support of Motion for Summary Judgment, and cites to these portions by providing the full name of the pleading and the page pinpoint.

¹⁸ Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 3-4.

¹⁹ *Id.* at 7-9.

²⁰ *Id.* at 7-8; *see also* Exhibit C at 15-31 to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

²¹ Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 7.

²² Exhibit D to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

each AMT-paid circulator received on a per-signature basis. [Exc. 224]²³ AMT-paid circulators received between \$1.79 and \$68.72 for each signature gathered. [Exc. 224]²⁴

Moreover, every one of these AMT-paid circulators signed Certification Affidavits swearing that they had gathered the signatures in compliance with AS 15.45.110(c)'s payment cap. [Exc. 224]²⁵

On March 17, 2020, Defendant Lieutenant Governor Kevin Meyer issued his decision certifying 19OGTX for the November 3, 2020 general-election ballot. [Exc. 019-021] AS 15.45.240 provides that a person aggrieved by a lieutenant governor's certification decision "may bring an action in the superior court to have the determination reviewed within 30 days of the date on which notice of the determination was given." Resource Development Council filed this lawsuit within that timeframe on April 10, 2020. [Exc. 001-009] On April 17, 2020, Resource Development Council moved the superior court to grant expedited consideration of its motion to deem the lawsuit "non-routine" and to expedite discovery and a decision. [R. 482-486] On May 26, 2020, the superior court ruled that Appellants were permitted to seek discovery from Fair Share and its professional circulator contractor AMT. [R. 209-213] Appellants issued discovery requests to Fair Share and domesticated and served a subpoena on AMT in Las Vegas, Nevada. [R. 367]

²³ Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 8-9; Exhibit E to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

²⁴ *Id.*

²⁵ Exhibit A to Plaintiffs' Memorandum in Support of Motion for Summary Judgment.

At the same time that Resource Development Council was pursuing discovery from Fair Share and AMT [R. 357-369], the parties were litigating dispositive motions. The State and Fair Share filed motions to dismiss, and Resource Development Council filed a cross-motion for summary judgment. [Exc. 22-35, 74-104, 118-174]

On July 6, Resource Development Council filed a motion for summary judgment asking the superior court to invalidate the 25,865 qualifying signatures AMT-paid circulators had submitted and supported with Certification Affidavits that falsely stated compliance with AS 15.45.110(c)'s payment cap. [Exc. 221-223; 224]²⁶ That motion was filed under seal because AMT and Fair Share had marked their contracts showing how much Fair Share paid to have the signatures gathered by a professional company as "confidential" pursuant to a protective order governing discovery. [Exc. 224]²⁷ This motion for summary judgment contains all of the necessary evidence that all AMT-paid circulators were paid in excess of AS 15.45.110(c)'s payment cap and all AMT-paid circulators falsely swore on their Certification Affidavits they had gathered the signatures while abiding by the payment cap. [Exc. 224]²⁸ In its response in opposition, Fair Share did not dispute the amount of compensation of AMT-paid circulators, how many signatures each AMT-paid circulator submitted to the State, or that they had collected 67% of all signatures submitted in support of 19OGTX. [Exc. 224] This motion was ripe but the

²⁶ Plaintiffs' Memorandum in Support of Motion for Summary Judgment (July 6, 2020).

²⁷ *Id.*

²⁸ *Id.*

superior court never ruled on it. [Exc. 224, 225 and 226] Resource Development Council's motion to unseal these materials that should be publicly viewable under Administrative Rule 37.5 was also ripe but also not ruled on prior to this appeal.²⁹ [R. 32-38]

On July 7, the superior court held oral argument on the pending dispositive motions. [R. 183]

On July 16, the superior court issued its Order Regarding Motions to Dismiss and Motions for Summary Judgment ("Superior Court's Order"). [Exc. 227-256] The superior court ruled that Resource Development Council was correct that AS 15.45.110(c) prohibited circulators from receiving payment in excess of \$1 per-signature collected, regardless of how the ballot group structured circulator payment (i.e., hourly, salary, or per-signature basis of compensation). [Exc. 227-228; 234-237] However, the superior court went on to rule that AS 15.45.110(c) violated the First Amendment by unduly restricting Fair Share's ability to pay and utilize signature gatherers to get 19OGTX on the ballot. [Exc. 238-246] Therefore, the superior court ruled that AS 15.45.110(c)'s payment restriction was "invalid." [Exc. 227-228]

The superior court also held that AS 15.45.130 required the lieutenant governor to count subscriptions even if supported by false certifications. [Exc. 246-251] If AS 15.45.130 authorized the lieutenant governor to invalidate subscriptions supported by a false circulator affidavit, the superior court reasoned, it was an unconstitutional

²⁹ On August 5, 2020, Judge Matthews issued a ruling that the motion to unseal was moot. However, that recent ruling is not part of the appellate record.

infringement on the free speech rights of those Alaskans that signed the 19OGTX initiative. [Exc. 251-255] On July 17, 2020, the superior court issued its Final Judgment. [Exc. 257]

On July 20, Resource Development Council appealed the superior court’s rulings that AS 15.45.110(c) is unconstitutional, that AS 15.45.130 does not permit the State to invalidate improperly certified petitions, and that AS 15.45.130, if it permits the State to invalidate improperly certified petitions, is unconstitutional.³⁰

On July 22, Fair Share appealed the superior court’s ruling that AS 15.45.110(c) prohibits circulator payment in excess of \$1 per signature gathered.³¹

II. STANDARD OF REVIEW

De novo review applies to the superior court’s interpretation of AS 15.45.110(c) that Fair Share is appealing. “Statutory interpretation” is a question of law that the Alaska Supreme Court “reviews de novo.”³² The Alaska Supreme Court applies its “independent judgment to questions of constitutional law and review *de novo* the construction of the Alaska and federal Constitutions.”³³

III. ANALYSIS

Fair Share provides three reasons why the superior court erred in interpreting AS 15.45.110(c) to prohibit any circulator compensation that exceeds \$1 per signature

³⁰ See Statement of Points on Appeal, S-17834 (July 20, 2020).

³¹ See Statement of Points on Appeal, S-17843 (July 22, 2020).

³² *Rosauer v. Manos*, 440 P.3d 145, 147 (Alaska 2019) (citing *Madonna v. Tamarack Air, Ltd.*, 298 P.3d 875, 878 (Alaska 2013)).

³³ *Alaskans for Common Language, Inc. v. Kritz*, 170 P.3d 183, 189 (Alaska 2007) (citing *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 65 (Alaska 2001)).

collected, regardless of whether the form of compensation is on an hourly, salary, or per-signature basis: (1) that AS 15.45.110(c)'s plain language exempts the hourly or salary compensation of circulators from the payment cap; (2) that the legislative history of AS 15.45.110(c) supports that reading; and (3) the doctrine of constitutional avoidance mandates that reading. None of these arguments has merit.

A. The Superior Court Correctly Concluded that AS 15.45.110(c) Applies to All Forms of Circulator Compensation Because It Does Not Distinguish Between Hourly, Salary, or Per-Signature Forms of Circulator Payment

Fair Share's one-page argument that the plain language of AS 15.45.110(c) does not pertain to the hourly or salary compensation of circulators falters on the words of the statute that uniformly caps the payment of circulators at \$1 per signature collected regardless of how the payment is structured. Likewise, the State's half-hearted argument, raised for the first time on appeal,³⁴ that AS 15.45.110(c) is ambiguous lacks any textual analysis explaining how the legislature's prohibition of a circulator receiving payment "greater than \$1 a signature, for the collection of signatures" may be read to allow a circulator to receive payment in excess of \$1 a signature for the collection of signatures.³⁵

"When 'interpreting a statute, [this Court] consider[s] its language, its purpose, and its legislative history, in an attempt to "give effect to the legislature's intent, with due

³⁴ The State did not assert in any filing in the superior court that AS 15.45.110(c) was ambiguous.

³⁵ State's Br. of Appellees, at 25-26 (Aug. 6, 2020).

regard for the meaning the statutory language conveys to others.”³⁶ The Court begins “with the text and its plain meaning, and [] use[s] a ‘sliding-scale approach’ to interpret the language.”³⁷ “‘The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.’”³⁸ “When ‘a statute’s meaning appears clear and unambiguous, ... the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.’”³⁹

If a statute is not ambiguous, this Court upholds the terms of the statute without application of “interpretive canons; a canon of construction is only ‘an aid to the interpretation of statutes that are ambiguous or that leave unclear the legislative intent.’”⁴⁰ This rule vindicates the separation of the legislative and judicial powers within the government.

In *State v. Planned Parenthood of the Great Northwest*, the Court concluded that the text of the statute, which barred the state from using Medicaid dollars to pay for abortions unless the pregnancy posed a “serious risk to the life or physical health” of the

³⁶ *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 992 (Alaska 2019) (quoting *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1234 (Alaska 2003) (quoting *Muller v. BP Expl. (Alaska) Inc.*, 923 P.2d 783, 787 (Alaska 1996))).

³⁷ *Id.* (quoting *Ward v. State, Dep’t of Pub. Safety*, 288 P.3d 94, 98 (Alaska 2012)).

³⁸ *Id.* (quoting *State v. Fyfe*, 370 P.3d 1092, 1095 (Alaska 2016) (quoting *Adamson v. Municipality of Anchorage*, 333 P.3d 5, 11 (Alaska 2014))).

³⁹ *Id.* (quoting *State v. Fyfe*, 370 P.3d at 1095 (quoting *Univ. of Alaska v. Geistauts*, 666 P.2d 424, 428 n.5 (Alaska 1983))).

⁴⁰ *Id.* at 993 (quoting *West v. Municipality of Anchorage*, 174 P.3d 224, 229 (Alaska 2007) (quoting *Crump v. State*, 625 P.2d 857, 859 (Alaska 1981)) (discussing *ejusdem generis* canon of interpretation)).

pregnant woman, was ambiguous because it did not define what constituted a “serious risk” to the physical health of the woman.⁴¹ Conversely, in *Lot 04B & 5C, Block 83 Townsite v. Fairbanks North Star Borough*, the Court concluded that the text of the statute, which capped the penalty a local government could impose for the failure to timely pay property taxes, was unambiguous and refused to apply an alternative interpretation.⁴² The property owner claimed in the appeal that the statute’s 20 percent cap on a penalty for failure to timely pay property taxes had to be calculated applying a tax exemption that it had not timely asserted during the tax year and that the government had not applied.⁴³ The Court looked at the text of the statute that provided that the local government could impose a “penalty not to exceed 20 percent of the tax due,” and concluded that nothing in that wording suggested ambiguity; at the end of the tax year, the local government issued a tax bill, and if it was not timely paid, the government could impose up to a 20 percent penalty on the unpaid bill.⁴⁴ The statute clearly contemplated limiting the local government’s penalty to 20 percent or less of the amount billed, not what could or should have been billed.⁴⁵ Because the meaning of the statute was clear, the Court rejected the property

⁴¹ *Id.* (quoting AS 47.07.068(a)).

⁴² *Lot 04B & 5C, Block 83 Townsite v. Fairbanks North Star Borough*, 208 P.3d 188, 193 (Alaska 2009).

⁴³ *Id.* at 193.

⁴⁴ *Id.*

⁴⁵ *Id.*

owner's interpretation based on the plain terms of the statute and without reviewing the legislative history of the statute.⁴⁶

Here, AS 15.45.110(c) is unambiguous, just like the penalty statute in *Lot 04B & 5C, Block 83 Townsite*. AS 15.45.110(c) provides in full:

A circulator may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.

The superior court correctly concluded that this text was unambiguous and bars the payment of circulators, regardless of how the ballot group structures that payment, if the payment exceeds \$1 for every signature collected:

The plain meaning of the words suggest no ambiguity. Petition circulators may not *receive* payment that is greater than \$1 per signature. The wording of the statute does not suggest it is capable of supporting Fair Share's interpretation. There is no discussion about the "form of payment." Instead, the language restricts the "amount of payment." A simple reading [of] the plain words shows that if a circulator received payment that ended up being greater than \$1 per signature, no matter how it was received, it seems the statute would prohibit it.⁴⁷

AS 15.45.110(c) prohibits a circulator from receiving payment or agreeing to receive payment "that is greater than \$1 a signature" for the "collection of signatures on a petition." This provision does not mention the form of compensation. It does not distinguish between different forms of circulator compensation—hourly, salary, or per-signature. It does not permit ballot groups to pay circulators in excess of \$1 per signature

⁴⁶ *Id.*

⁴⁷ Exc. 235 (emphasis in original).

collected if the payments are structured on an hourly or salary basis. To the contrary, this provision prohibits any form of payment to circulators in excess of \$1 for every signature they have gathered. Unlike the statute at issue in *Planned Parenthood of the Greater Northwest*, there are not any undefined statutory terms that render AS 15.45.110(c)'s application to differing situations unknown. It applies across the board to the payment of circulators. Fair Share has not pointed to any ambiguity in the words in the statute.

Fair Share's cursory argument about AS 15.45.110(c)'s plain text shows that it is unambiguous. Fair Share does not even attempt to break down the words contained in the statute. Fair Share fails to show that the words are susceptible to different meanings. Instead, Fair Share engages in a *policy* argument, unsupported by any evidence or affidavits, that it would be too hard for Fair Share to collect the signatures needed for the state to place the 19OGTX initiative on the ballot if it could only pay circulators \$1 or less for each signature collected on a petition. This Court has repeatedly made clear that it is err for a court to consider policy arguments when focusing on the plain meaning of text:

When a statute unambiguously requires a certain result, policy arguments advocating for a different result are better addressed to the legislature. It is not a court's role to decide whether a particular statute or ordinance is a wise one; the choice between competing notions of public policy is to be made by elected representatives of the people.⁴⁸

This Court should decline Fair Share's invitation to blur the analysis of the plain meaning of the words contained in AS 15.45.110(c) with policy considerations of its application.

⁴⁸ *Ward v. State, Dept. of Public Safety*, 288 P.3d 94, 106 (Alaska 2012) (original quotation marks and footnotes omitted) (quoting *State v. Saathoff*, 29 P.3d 236, 242 (Alaska 2001) (declining to address policy arguments when language and legislative purpose made statute's meaning clear)).

Moreover, Fair Share's speculation that limiting circulator payment to \$1 per signature collected would render future ballot groups unable to collect sufficient signatures to gain ballot access is incorrect. Recent signature gathering efforts show Fair Share's assumption to be false. Recently, proponents of an effort to recall Governor Dunleavy collected nearly 50,000 signatures in support of that effort, and did so in five weeks utilizing only volunteer petition circulators.⁴⁹ Political movements with genuine grass roots in Alaska have not been hampered by AS 15.45.110(c) or by using only volunteer circulators.

Despite not appealing Judge Matthews' ruling that AS 15.45.110(c) was unambiguous and capped circulator payment at \$1 or less per signature for the collection of signatures regardless of how the ballot group structured the payment,⁵⁰ the State now makes a cursory run at convincing this Court that AS 15.45.110(c) is ambiguous and should be interpreted as allowing circulator payment in excess of \$1 per signature.⁵¹ But, like Fair Share, the State fails to explain how AS 15.45.110(c) is ambiguous in prohibiting circulator

⁴⁹ See Alex DeMarban and James Brooks, *Recall Dunleavy Campaign Turns in 49,000 Signatures Collected in 5 Weeks*, ANCHORAGE DAILY NEWS, Sept. 5, 2019 (available at: <https://www.adn.com/politics/2019/09/05/recall-dunleavy-campaign-turns-in-48000-signatures-collected-in-five-weeks/>). Recall Dunleavy's campaign finance disclosure forms for the time period when these signatures were gathered shows no income and no expenditures. See Third Quarterly Report for 2019-Recall Dunleavy ballot group (Oct. 8, 2019) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=28314&ViewType=CD>).

⁵⁰ Nor did the State argue below that AS 15.45.110(c) was ambiguous or that it permitted hourly or salary payment of circulators in excess of \$1 per signature for the collection of signatures.

⁵¹ State's Br. of Appellees at 25-26.

payment “that is greater than \$1 a signature, for the collection of signatures on a petition.”⁵² Nor does the State explain why the Court should presume that AS 15.45.110(c) raises “serious constitutional doubts,” as interpreted by the superior court when the State admits the superior court erred in holding AS 15.45.110(c) unconstitutionally burdens ballot groups’ free speech rights.⁵³ The State cannot simultaneously assert that the superior court erred in holding AS 15.45.110(c) unconstitutional because there was no evidence that it burdened free speech rights but also ask this Court to conclude that AS 15.45.110(c) raises serious enough constitutional concerns to deviate from the statute’s plain language. The State cannot have its cake and eat it too.

This Court should affirm the superior court’s ruling that AS 15.45.110(c) prohibits any circulator payment that exceeds \$1 for every signature collected because the statute’s plain terms require that result.

B. The Superior Court Correctly Concluded that AS 15.45.110(c)’s Legislative History Confirms the Legislature Intended the Cap on Circulator Payment to Apply to All Forms of Circulator Payment

In its attempt to have this Court override AS 15.45.110(c)’s plain meaning, Fair Share includes in its opening brief the same smattering of legislative history of AS 15.45.110(c) that the superior court concluded failed to capture the legislature’s intent to prohibit circulator payment in any form that exceeded \$1 per signature gathered.⁵⁴ When the legislative history of AS 15.45.110(c) is considered in full, it is clear that the Alaska

⁵² AS 15.45.110(c).

⁵³ State’s Br. of Appellees at 26-29.

⁵⁴ Cross-Appellant Br. at 11-14.

Legislature **explicitly considered and rejected** limiting AS 15.45.110(c) to only situations where ballot groups are compensating circulators based on how many signatures the circulator gathered. The legislative history of AS 15.45.110(c) confirms the Alaska Legislature contemplated and intended the plain meaning of its wording.

Statutory interpretation in Alaska begins with the plain meaning of the statute's text.⁵⁵ But “‘the plain meaning of a statute does not always control its interpretation’; ‘legislative history can sometimes alter a statute’s literal terms.’”⁵⁶ Nonetheless, under our sliding-scale approach to statutory interpretation, a statute’s plain language remains significant: “‘the plainer the language of the statute, the more convincing contrary legislative history must be.’”⁵⁷

The Alaska Legislature passed AS 15.45.110(c) in 1998.⁵⁸ It was a portion of Senate Bill No. 313 passed in the Second Session of the Twentieth Legislature.⁵⁹

Senator Sharp of Fairbanks sponsored Senate Bill 313. As originally introduced, AS 15.45.110(c) read as follows:

A sponsor⁶⁰ may not receive payment or agree to receive payment, and a person or an organization may not pay or agree to pay, for the collection of

⁵⁵ *Ward*, 288 P.3d at 98 (citing *City of Kenai v. Friends of Recreation Ctr., Inc.*, 129 P.3d 452, 458–59 (Alaska 2006)).

⁵⁶ *Id.* at 98 (quoting *Bartley v. State, Dep’t of Admin., Teacher’s Ret. Bd.*, 110 P.3d 1254, 1258 (Alaska 2005)).

⁵⁷ *Id.* (quoting *Bartley*, 110 P.3d at 1258).

⁵⁸ *See* § 2 of Chapter 80, Session Laws of Alaska 1998.

⁵⁹ [Exc. 156-159].

⁶⁰ In 2000, the Alaska Legislature made non-material changes to AS 15.45.110(c) to rename the individuals collecting signatures from “sponsors” to “circulators.” *See*

signatures on a petition if any part of the payment is based on the number of signatures collected. **This subsection does not prohibit a sponsor from being paid an amount that is not based on the number of signatures collected.**⁶¹

But this emphasized language did not survive the legislative debates and did not make the final cut.

Senate Bill 313 was passed out of the Senate unrevised, but it was substantially changed by the House. Representative Gene Therriault of Fairbanks was the Co-Chair of the House Finance Committee, and he introduced a new version of SB 313 (FIN) that proposed to have AS 15.45.110(c) read as follows:

A sponsor may not receive payment or agree to receive payment that is greater than \$1 a signature, and a person or an organization may not pay or agree to pay an amount that is greater than \$1 a signature, for the collection of signatures on a petition.⁶²

Three days later, the Senate unanimously passed SB 313 (FIN). Alaska Governor Tony Knowles signed it into law on June 9, 1998.

Far from Senator Sharp's original Senate Bill 313, which explicitly permitted the payment of circulators on an hourly or salary basis in excess of \$1 per signature gathered, the finally enacted AS 15.45.110(c) explicitly prohibits by its broad terms any form of "payment" of circulators that exceeds \$1 for every signature the circulator gathered.

Senate CS for CS for House Bill No. 163(RLS) am S at p. 26, available at <http://www.akleg.gov/PDF/21/Bills/HB0163F.PDF>.

⁶¹ [Exc. 152-155] (Senate Bill No. 313, Twentieth Legislature–Second Session (Feb. 2, 1998) (emphasis added)).

⁶² [Exc. 156-159] (Senate Bill No. 313 (FIN)).

The legislative history of AS 15.45.110(c) confirms the cap on circulator payment broadly applies to all form of circulator compensation, including hourly, salary, and per-signature bases of compensation.

If there was any doubt that the Alaska Legislature intended AS 15.45.110(c) to prohibit the salary or hourly payment of circulators in excess of \$1 per signature gathered, it was eliminated in 2009. In 2009, Representatives Millett, Johansen, and Wilson introduced House Bill 36, which sought to amend AS 15.45.110(c) to allow the hourly or salary payment of circulators in excess of \$1 per signature gathered.⁶³ Specifically, House Bill 36 provided:

* **Sec. 5.** AS 15.45.110(c) is amended to read:

(c) A circulator may not receive payment or agree to receive payment [THAT IS GREATER THAN \$1 A SIGNATURE], and a person or an organization may not pay or agree to pay an amount, based on the number of registered voters who signed the petition. Nothing in this subsection prohibits a person or an organization from employing a circulator and:

- (1) paying an hourly wage or salary;
- (2) establishing either express or implied minimum signature requirements for the circulator;
- (3) terminating the petition circulator's employment if the circulator fails to meet certain productivity requirements; or
- (4) paying discretionary bonuses based on reliability, longevity, and productivity [THAT IS GREATER THAN \$1 A SIGNATURE, FOR THE COLLECTION OF SIGNATURES ON A PETITION].

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⁶³ [Exc. 160-164] (House Bill No. 36, available at <http://www.akleg.gov/PDF/26/Bills/HB0036A.PDF>).

⁶⁴ *Id.*

But the final version of HB 36 as enacted into law did not include any change to AS 15.45.110(c).⁶⁵ The Legislature considered modifying AS 15.45.110(c) to permit what Fair Share seeks to be allowed, and rejected the hourly or salary payment of circulators in excess of \$1 per signature gathered.

AS 15.45.110(c)'s plain language is clear, and Fair Share has failed to shoulder the heavy burden under this Court's sliding-scale approach to provide clear legislative history to the contrary of the statute's plain terms. This Court should affirm the superior court's conclusion that AS 15.45.110(c)'s legislative history supports its plain meaning:

This Court cannot construe the statute to mean that monthly, hourly or salary type payment are permitted when the amount paid exceeds \$1 per signature. And it seems that, based on the transcripts of the 1998 hearings, the legislature was well aware of the constitutionality issue, and yet enacted legislation with a hard limit of \$1 per signature regardless.⁶⁶

There are many valid reasons why the Alaska Legislature capped circulator payment at \$1 per signature regardless of how the ballot group structured payment.

Commentators have written about the valid interests states have to keep circulator payment to a minimum.⁶⁷ The Alaska Legislature understood the practical reality that with enough money to pay circulators, any individual can get his pet legal interest on the ballot. The owner of a petition circulation company once candidly professed: "Yeah, I think that

⁶⁵ [Exc. 165-174] (SCS CSSSHB 36(JUD)), available at <http://www.akleg.gov/PDF/26/Bills/HB0036Z.PDF>).

⁶⁶ Exc. 238.

⁶⁷ See Daniel Lowenstein & Robert Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 Hastings Const. L.Q. 175, 175 (Fall 1989) (hereinafter "Lowenstein & Stern, *Paid Initiative Petition Circulators*").

if you have enough money, you can get on the ballot. Yeah, no question.”⁶⁸ This is certainly true in the case of the 19OGTX initiative, which, according to Fair Share’s campaign finance disclosures,⁶⁹ has been bankrolled almost entirely by Robin Brena, who is the chairman of the Fair Share ballot group, its lead attorney, the owner of the law firm representing Fair Share, and the majority owner of RSD Properties, LLC, which has contributed space to the Fair Share campaign.⁷⁰

Gathering signatures for a petition is ultimately a numbers game, and if a wealthy individual hires enough circulators, he will obtain enough signatures to get any measure on the ballot: “The statement that under present conditions, anyone willing to put up the funds can buy a place on the ballot is no hyperbole.”⁷¹ The Alaska Legislature understood these realities, as the sponsor of the bill that became AS 15.45.110(c) discussed in noting that

⁶⁸ *Id.* at 175 & n. 1.

⁶⁹ *See* Fair Share’s Third Quarterly Report, Campaign Disclosure Form (2019) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=29697&ViewType=CD>); Fair Share’s Fourth Quarterly Report, Campaign Disclosure Form (2019) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=29908&ViewType=CD>); Fair Share’s First Quarterly Report, Campaign Disclosure Form (2020) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=29743&ViewType=CD>); Fair Share’s Second Quarterly Report, Campaign Disclosure Form (2020) (available at: <https://aws.state.ak.us/ApocReports/Common/View.aspx?ID=29927&ViewType=CD>).

⁷⁰ According to Fair Share’s four quarterly campaign finance reports filed with APOC, *supra* n. 69, Brena—individually and as owner of the Brena, Bell & Walker, P.C. law firm and 70 percent owner of the closely held RSD Properties, LLC—has contributed \$541,201.58 of Fair Share’s total reported income to date of \$664,330, or more than 81% of Fair Share’s income. *Supra* n. 69.

⁷¹ *See* Lowenstein & Stern, *Paid Initiative Petition Circulators*, at 199 (summarizing the social science and anecdotal evidence from petition circulations).

the payment limitation was seeking to bring the initiative process back to a grassroots effort that had bona fide local support beyond one wealthy benefactor.

C. The Doctrine of Constitutional Avoidance Does Not Permit this Court to Ignore AS 15.45.110(c)’s Plain Meaning and the Legislature’s Intent

Fair Share’s analysis of AS 15.45.110(c) goes completely off the rails when it gets to the constitutional avoidance doctrine. Fair Share asks this Court to turn this doctrine on its head, apply a presumption of unconstitutionality to AS 15.45.110(c) and then re-write AS 15.45.110(c) to nullify its violation of the cap on circulator payment. Here, it would be inappropriate for this Court to apply the doctrine of constitutional avoidance for two reasons: (1) as shown above, *supra* III.A., AS 15.45.110(c) is not ambiguous; and (2) Fair Share has not shouldered its burden of demonstrating that AS 15.45.110(c) is unconstitutional.

The first fatal issue with Fair Share’s position that the Court should apply the doctrine of constitutional avoidance to AS 15.45.110(c) is that the statute is unambiguous. “[C]onstitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction. The canon has no application absent ambiguity.”⁷² After, and only after, the party challenging the statute as unconstitutional demonstrates that the statute is ambiguous, may this Court apply the doctrine of constitutional avoidance.⁷³ This rule ensures the exercise of statutory

⁷² *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (original quotation marks and citations omitted); *Bigley v. Alaska Psychiatric Institute*, 208 P.3d 168, 184 (Alaska 2009) (applying the doctrine of constitutional avoidance only after determining the statute was ambiguous).

⁷³ *Bigley*, 208 P.3d at 184 (“The canon of constitutional avoidance recommends that ‘when the validity of an act of the legislature is drawn in question, and even if a serious

interpretation is grounded in determining *legislative* intent, and prevents courts from ignoring the legislature’s intent in favor of the bench’s preferred interpretation.⁷⁴ AS 15.45.110(c) is not ambiguous.

Above, Resource Development Council demonstrated⁷⁵ that the superior court correctly concluded that AS 15.45.110(c)’s wording “suggest no ambiguity.”⁷⁶ The statute caps the payment of circulators at \$1 or less for each signature collected, and does not distinguish between forms of circulator payment. Instead, the language restricts the amount of payment, and broadly applies that to all paid circulators. There is no ambiguity

doubt of constitutionality is raised, it is a cardinal principle ... to first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. Because AS 47.30.839(e) is ambiguous, and because an interpretation that imposes a rigid seventy-two hour limit may in some circumstances violate due process, we hold that the statute should be interpreted as offering the court the discretion to conduct a separate proceeding on the constitutional questions required by [*Myers v. Alaska Psychiatric Institute*, 138 P.3d 238 (Alaska 2006)] that does not occur within seventy-two hours of the medication petition.”) (internal brackets and quotation marks omitted); *Nielsen*, 139 S. Ct. at 972 (rejecting application of the doctrine of constitutional avoidance because “constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction.”) (original quotation marks and citations omitted); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (“The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one plausible construction.”) (internal brackets and quotation marks omitted); *Clark v. Martinez*, 543 U.S. 371, 385 (2005); *Warger v. Shauers*, 135 S. Ct. 521, 529 (2014); *United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 494 (2001).

⁷⁴ *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (“Despite this constitutional problem, if ‘Congress has made its intent’ in the statute ‘clear, “we must give effect to that intent.”’) (quoting *Miller v. French*, 530 U.S. 327, 336 (2000) (quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962))).

⁷⁵ *Supra* III.A.

⁷⁶ Exc. 235.

in AS 15.45.110(c) and the superior court correctly concluded, after reviewing the legislative history, that circulator payment on a monthly, hourly, salary, or per-signature basis is prohibited “when the amount paid exceeds \$1 per signature.”⁷⁷ Because there is no ambiguity in AS 15.45.110(c), the legislature’s intent is clear, and this Court may not use the doctrine of constitutional avoidance to displace that intent with Fair Share’s preferred interpretation.

The second fatal issue with applying the doctrine of constitutional avoidance to AS 15.45.110(c) is that Fair Share has not shown that a flat \$1 per signature cap on circulator payment is unconstitutional or raises serious constitutional concerns. This Court rightfully requires the party challenging the constitutionality of a statute to demonstrate that the statute is unconstitutional before it will apply the doctrine of constitutional avoidance: “A party raising a constitutional challenge to a statute bears the burden of demonstrating the constitutional violation. A presumption of constitutionality applies, and doubts are resolved in favor of constitutionality. The party attacking a statute has the burden to ‘negative every conceivable basis which might support it.’”⁷⁸

None of the decisions from the U.S. Court of Appeals cited by the superior court or Fair Share invalidated prohibitions on circulator payment. None of these cases support

⁷⁷ Exc. 238.

⁷⁸ *State, Dept. of Revenue v. Andrade*, 23 P.3d 58, 71 (Alaska 2001) (citing *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998); *Kaitmailand, Inc. v. Lake and Peninsula Borough*, 904 P.2d 397, 401 (Alaska 1995) in turn quoting *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 548 (1983); and *Kimoktoak v. State*, 584 P.2d 25, 31 (Alaska 1978)).

Fair Share's contention that it need not submit any evidence of the burden that AS 15.45.110(c)'s cap on circulator payment allegedly has on petition circulation in Alaska.

Fair Share cites the following cases in its effort to show AS 15.45.110(c) is unconstitutional: the U.S. Supreme Court's decision in *Meyer v. Grant*,⁷⁹ the Eighth Circuit's decision in *Initiative & Referendum Inst. v. Jaeger*,⁸⁰ and the Ninth Circuit's decision in *Prete v. Bradbury*.⁸¹ None of these cases demonstrate that AS 15.45.110(c) is unconstitutional.

Meyer v. Grant struck down Colorado's statute that prohibited compensating circulators in any amount, but the court only struck it down as unconstitutional after the evidence presented at trial showed the burden the statute caused on petition circulation in Colorado.⁸² Here, AS 15.45.110(c) only caps the amount circulators may be compensated and Fair Share has made no evidentiary showing of the burden it places on petition circulation in Alaska.

Jaeger **upheld** North Dakota's statutory ban on paying circulators on a per-signature basis. The Eighth Circuit reasoned: "The appellants have produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability

⁷⁹ Cross-Appellant Br. at 17 (citing *Meyer v. Grant*, 486 U.S. 414, 414-425 (1988)).

⁸⁰ *Id.* at 17-18 (citing *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001)).

⁸¹ *Id.* (citing *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006)).

⁸² *Meyer*, 486 U.S. at 417-18 & n.6.

to collect signatures. The appellants have only offered bare assertions on this point.”⁸³ Here, like in *Jaeger*, Fair Share has produced no evidence that capping circulator payment to \$1 per signature would in any way burden their ability to collect signatures. Fair Share has only offered bare assertions.

Finally, *Prete* upheld Oregon’s statutory ban on paying circulators on a per-signature basis. Importantly, the Ninth Circuit came to that holding after explaining the burden a party challenging a statutory restriction on circulator payment needed to shoulder to invalidate the statute:

To the extent *Meyer* may be read to indicate that any resulting decrease in the pool of available circulators is sufficient to constitute a “severe burden” under the First Amendment, in *Buckley [v. American Constitutional Law Foundation, Inc.]*, 525 U.S. 182 (1999), the Court refined its analysis and made clear that the *degree* of the decrease resulting from the measure is properly considered in determining the severity of the burden.⁸⁴

The Ninth Circuit then walked through the extensive evidence that the challengers had submitted to show the burden Oregon’s statutory prohibition on paying circulators on a per-signature basis had on petition circulation.⁸⁵ Then, after reviewing the challenger’s evidence of the burden on free speech, the court turned to Oregon’s interest in regulating the initiative process and held that the challengers had not shown it “severely burden[ed] their First Amendment rights in circulating the initiative petitions” and upheld the statute.⁸⁶

⁸³ *Jaeger*, 241 F.3d at 618.

⁸⁴ *Prete*, 438 F.3d at 962-63.

⁸⁵ *Id.* at 964-68.

⁸⁶ *Id.* at 971.

Here, Fair Share has submitted no evidence of the burden AS 15.45.110(c) placed on petition circulation in Alaska. *Prete* is of no help to Fair Share.

Resource Development Council's opening brief at pages 17-25 exhaustively discusses why it was error for the superior court to invalidate AS 15.45.110(c) as an "unconstitutional restriction on free speech" without any evidence whatsoever of how AS 15.45.110(c) affects signature gathering efforts in Alaska, if at all. This was error. Under *Meyer*, *Jaeger*, *Buckley*, *Prete*, and this Court's precedents, Fair Share, as the party asserting that AS 15.45.110(c) imposes an unconstitutional burden on its ability to circulate petitions, had the burden to introduce evidence of that burden. The superior court erred by invalidating AS 15.45.110(c) without any evidence of the burden it supposedly places on petition circulation.

The constitutional avoidance doctrine does not apply here because AS 15.45.110(c) is not ambiguous, and Fair Share has presented no evidence upon which the Court could rule AS 15.45.110(c)'s plain terms unconstitutionally burden petition circulation in Alaska.

D. Invalidation of Signatures on a Petition Does Not Disenfranchise Any Voters, Including a Voter Who Signed the Petition

Finally, Resource Development Council is compelled to respond and correct the erroneous rhetoric that Fair Share perpetuates in each of its filings. Fair Share's brief is replete with references to the invalidation of signatures on a petition as the "disenfranchisement" of Alaskan voters.⁸⁷ Fair Share purposefully misuses "disenfranchise" because of the strong negative reaction that it evokes, but the law is clear:

⁸⁷ See *e.g.* Cross-Appellant's Br. at 3-4, 19.

petition signatories have no right to vote on the initiative they supported by signing a petition and the invalidation of signatures on a petition does not disenfranchise voters. The State's invalidation of signatures on a petition and the decertification of an initiative from the ballot does not disenfranchise even a single voter.

Equating the invalidation of petition subscriptions and the removal of an initiative from the ballot to disenfranchising voters would lead to absurd results. A ballot group would be *required* to submit petition signatures they collected. Otherwise the ballot group would be “disenfranchising” the people who signed the petition. Of course, Fair Share retained the ability to collect but never submit signatures in support of the 19OGTX initiative, and doing so would not disenfranchise voters.

As Resource Development Council's Opening Brief makes clear in its discussion on pages 37-45, courts have uniformly rejected claims that invalidation of petition signatures constitutes the disenfranchisement of voters.⁸⁸ These courts recognize that content-neutral, non-discriminatory statutes governing the validity of subscriptions on a petition are valid, and their application does not violate any free speech or voting rights. This reasoning is confirmed by the decisions by the supreme courts of Montana,⁸⁹

⁸⁸ See *Taxpayers United for Assessment Cuts v. Austin*, 994 F.2d 291, 296-97 (6th Cir. 1993); *Kendall v. Balcerzak*, 650 F.3d 515, 522 (4th Cir. 2011); *Neire v. St. Louis County*, 305 F.3d 834, 838 (8th Cir. 2002); *Citizens Committee for the D.C. Video Lottery Terminal Initiative v. District of Columbia Bd. of Elections and Ethics*, 860 A.2d 813, 818 (D.C. Cir. 2004).

⁸⁹ *Montanans for Justice v. State ex rel. McGrath*, 146 P.3d 759, 777 (Mont. 2006) (invalidating 64,463 petition signatures).

Oklahoma,⁹⁰ Arizona,⁹¹ Ohio,⁹² Maine,⁹³ and Arkansas,⁹⁴ invalidating enough signatures to remove ballot initiatives from upcoming election ballots. None of these courts were concerned they were disenfranchising their state’s voters by upholding initiative laws that require circulators to comply with circulation rules. This Court should reject Fair Share’s misuse of the term “disenfranchise” and clarify the unfortunate dicta in *North West Cruiseship Association of Alaska, Inc. v. State* that appeared to equate the invalidation of signatures in a petition to the “disenfranchisement” of voters.

IV. CONCLUSION

For the foregoing reasons, Resource Development Council respectfully requests this Court uphold the superior court’s ruling that AS 15.45.110(c) unambiguously prohibits any circulator payment in excess of \$1 for each signature gathered, whether the ballot group has structured its payment to the circulator on a monthly, hourly, salary, or per-signature basis. Further, this Court should hold that because AS 15.45.110(c) is unambiguous, the doctrine of constitutional avoidance does not apply, and that because Fair Share has not submitted any evidence of the burden AS 15.45.110(c) places on petition circulation in

⁹⁰ *In re Initiative Petition No. 379, State Question No. 726*, 155 P.3d 32, 46 (Okla. 2006) (invalidating more than 57,000 petition signatures).

⁹¹ *Brousseau v. Fitzgerald*, 675 P.2d 713, 715 (Ariz. 1984) (invalidating hundreds of petition signatures).

⁹² *State ex rel. Schmelzer v. Board of Elections of Cuyahoga County*, 440 N.E.2d 801, 803-04 (Ohio 1982) (invalidating 50 petition signatures).


⁹³ *Maine Taxpayers Action Network v. Secretary of State*, 795 A.2d 75, 82 (Me. 2002) (invalidating 14,506 petition signatures).

⁹⁴ *Benca v. Martin*, 500 S.W.3d 742, 748-51 (Ark. 2016) (invalidating 12,104 petition signatures).

Alaska, Fair Share's allegation that it is an unconstitutional burden on the ballot group's free speech rights fails.

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